Supreme Court, U.S.
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No. 86-57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TENNESSEE, JAMES E. WORD, COMMISSIONER, TENNESSEE DEPARTMENT OF HEALTH AND ENVIRONMENT, and the TENNESSEE WILDLIFE RESOURCES AGENCY,

Petitioners,

vs.

CHAMPION INTERNATIONAL CORPORATION, d/b/a CHAMPION PAPERS,

Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.* (1982), preempted the field of interstate water pollution, thereby precluding the application of a state's laws to cases of alleged pollution arising from discharges outside of that state's boundaries.[1]

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[1] Pursuant to Rule 28.1, Supreme Court Rules, the parent company of respondent Champion International Corporation is Champion International Corporation. Champion International Corporation's affiliates and subsidiaries (other than wholly-owned subsidiaries) are Panning Lumber & Supply Company, Inc., U.S. Plywood Corporation, Angelina & Neches River Railroad Company, Champion Papel e Celulose S.A., Bates Do Brazil Papel e Celulose, S.A., Weldwood of Canada Limited, Quinsam Coal Ltd., Babine Forest Products Limited, Babine Forest Products (Trustee) Limited, Empaques Multiwall Ultrafort, S.A., Setter GmbH, Obbola Lineboard AB., Monterey Printing and Packaging Limited, and International Cartons and Packaging Limited.

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STATEMENT OF THE CASE

The Federal Water Pollution Control Act (FWPCA), as amended, places responsibility for administration of the Act on the Administrator of the federal Environmental Protection Agency. 33 U.S.C. §§ 1251 (1982). To abate and control water pollution, the 1972 amendments invoked a methodology which relies upon restricting discharges of pollutants. It is unlawful to discharge any pollutant without a permit. 33 U.S.C. §§ 1311(a), 1342 (1982). These permits may be issued by the federal Environmental Protection Agency or the Agency may authorize a

state with an approved program to issue permits within its jurisdiction. 33 U.S.C. §§ 1342 (1982). North Carolina has an approved program.

Respondent discharges into the Pigeon River in North Carolina. Respondent has been operating either under a discharge permit issued by North Carolina or under an application pending before North Carolina for renewal of permit. Petitioner insists that the discharges which respondent makes in North Carolina pollute the Pigeon River downstream in Tennessee.

Petitioner filed an action in a Tennessee state court seeking to enjoin all activities of respondent which allegedly violate the water quality standards established by the Tennessee Water Quality Act, Tenn. Code Ann. § 69-3-101 *et seq.* (1983), and to assess civil penalties against respondent. The complaint averred that the alleged pollution constituted a public nuisance.

Respondent filed a motion to dismiss and the trial court denied that motion. The Tennessee Court of Appeals affirmed the trial court's action. The Tennessee Supreme Court reversed and sustained the motion to dismiss, which motion it treated as a motion for summary judgment. The Tennessee Supreme Court held that the Federal Water Pollution Control Act preempts both federal common law and state law in the area of control of pollution in interstate waters and that environmental authorities may not take official action against a permit holder from another state except as authorized by the Federal Water Pollution Control Act.

Petitioner is seeking to have this Court review the Tennessee Supreme Court's decision.

SUMMARY OF ARGUMENT OR REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the Tennessee Supreme Court correctly decided this case. The decision is consistent with the provisions of the Federal Water Pollution Control Act. Although this Court has not specifically decided the issue of applicability of state law to interstate water pollution cases, it is submitted that expressions contained in opinions by this Court indicate that state law is not applicable in such cases. The Tennessee Supreme Court decision is consistent with such expressions of this Court.

ARGUMENT

Petitioner states two reasons for granting certiorari.

First, petitioner argues that this case should be considered in tandem with *International Paper Company v. Ouellette,* 106 S.Ct. 1457 (1986), *granting cert. to* 776 F.2d 55 (2d Cir. 1985) (*Ouellette*). Petitioner insists that such action will enhance the Court's ability to resolve issues common to both cases. It is not necessary to grant certiorari in this case in order to fully review the *Ouellette* case. The *Ouellette* case must be reviewed on the basis of its facts. The granting or denying of certiorari in the instant case will not change the facts in the *Ouellette* case.

The second reason advanced by petitioner for granting certiorari is that it will prevent the Tennessee Supreme Court decision from becoming final. Respondent respectfully insists that such decision is correct and there is no reason to delay its finality.

Respondent respectfully suggests that the Tennessee Supreme Court is correct in holding that the FWPCA has preempted the field of interstate water pollution. The FWPCA, prior to the 1972 Amendments, made it clear that it was federal, not state, law that in the end controlled the pollution of interstate or navigable waters. *Illinois v. City of Milwaukee,* 406 U.S. 91, 107 (1972). Prior to the passage of its 1972 Amendments, the FWPCA did not preclude the application of federal common law, but the Supreme Court recognized that a federal statute could be passed which would preclude such application. *Id.*

Congress passed the 1972 Amendments to the FWPCA, which Amendments Congress intended to be a "total restructuring" and "complete rewriting" of the water pollution legislation. The Amendments were to be an all-encompassing program of water pollution legislation. *City of Milwaukee v. Illinois,* 451 U.S. 304, 317-18 (1981). Following the passage of the 1972 Amendments to the FWPCA, this Court held that

Congress had so occupied the field that there was no basis for a federal court to impose more stringent limitations by reference to federal common law. *City of Milwaukee v. Illinois,* 451 U.S. 304, 319 (1981). In a footnote in the same opinion, this Court pointed out an inconsistency in the Illinois argument and the District Court's decision that both federal and state nuisance law applied in that case. "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois,* 451 U.S. 304, 312, n.7 (1981). This Court declined to grant certiorari to review the Seventh Circuit's determination that since federal common law controlled, the Court would not address the state law claims. *Illinois v. City of Milwaukee,* 451 U.S. 982 (1981).

In the 1972 *Milwaukee* case, this Court was concerned that Illinois did not have a forum in which to protect its interest unless federal common law was created. *City of Milwaukee v. Illinois,* 451 U.S. 304, 325 (1981), *citing Illinois v. City of Milwaukee,* 406 U.S. 91, 104 (1972). The 1972 Amendments, however, provided ample opportunity for a state affected by decisions of a neighboring state's permit-granting process to seek redress. *City of Milwaukee v. Illinois,* 451 U.S. 304, 326 (1981). Tennessee has been participating in the North Carolina permitting process regarding respondent's permit application. That is its remedy. The FWPCA leaves no room for each state to write its own ticket on interstate water pollution. It is inconsistent with the policy and provisions of the FWPCA to allow one state to impose its laws on an out-of-state discharger operating under the permit provisions of the FWPCA.

The Seventh Circuit held that the FWPCA precluded application of one state's law to discharges occurring in interstate waters in another state. *Illinois v. City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984), *cert. denied,* 105 S.Ct. 979-80 (1985). This Court denied certiorari. *Id.*

Certiorari should not be granted in the instant case because the Tennessee Supreme Court has correctly decided that Congress in enacting the 1972 Amendments to the FWPCA preempted the field of interstate water pollution. Although this Court has not specifically decided the issue of the applicability of state law to interstate water pollution cases, it is submitted that expressions contained in opinions by this Court indicate that state law is not applicable in such cases. The Tennessee Supreme Court decision is consistent with those expressions of this Court. There is no reason to review the Tennessee Supreme Court decision. This Court has declined to grant certiorari on two occasions when the Seventh Circuit either declined to address state law claims or declined to apply state law claims to an interstate water pollution case. While the denial of certiorari indicates no opinion on the subject, it should be noted that petitioner advances no compelling reason why certiorari should now be granted to review this same subject matter.

The *Ouellette* case reached a very different result as it determined that the FWPCA authorized actions to redress injuries caused by water pollution of interstate waters under the common law of the state in which the injury occurred. In view of the provisions of the FWPCA and certain expressions made by this Court, it is not surprising that certiorari was granted. The instant case reached a very different conclusion and it is respectfully submitted that the same reasons do not exist here for granting certiorari.

CONCLUSION

Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

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